SUPREME COURT OF YUKON

Citation: *R. v. Rowat*, 2018 YKSC 50

Date: 20181113
S.C. No. 18-AP002
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND

CURTIS STEVEN ROWAT

RESPONDENT

Before: Mr. Justice L.F. Gower

Appearances:
Leo Lane — Counsel for the Appellant
Joni Ellerton — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by the Crown from an acquittal on charges of driving over 80 mgs/% (s. 253(1)(b) of the *Criminal Code*) and possession of cocaine (s. 4(1) of the *Controlled Drugs and Substances Act*). The offences are alleged to have occurred in Whitehorse in January 2017, in the early morning hours. The Deputy Territorial Court Judge acquitted primarily on the basis that the RCMP officer who stopped the accused, Mr. Rowat, in his motor vehicle on the Alaska Highway, had no objectively reasonable grounds for doing so. Consequently, he found that the officer,

Cst. Jury, breached the accused's right to be free from arbitrary detention under s. 9 of the *Charter*. He also excluded all the evidence flowing from the arbitrary stop.

FACTS

[2] Cst. Jury was driving a marked police vehicle down Two Mile Hill, in the City of Whitehorse, at about 1:40 a.m. on January 27, 2017. She noticed a vehicle travelling in the opposite direction up the hill at a high rate of speed. Her radar indicated that the vehicle was travelling at 111 kilometres per hour in a 60 kilometre per hour zone. It was dark in that area of Two Mile Hill and Cst. Jury made no observations as to the vehicle's make, model or size; nor did she record the vehicle's licence plate number. She only noticed that it was a dark coloured car.

[3] Cst. Jury put on her emergency lights and siren and continued down Two Mile Hill in order to make a U-turn at the first available intersection. She lost sight of the vehicle, but continued up Two Mile Hill towards the intersection with the Alaska Highway. When she arrived at the intersection, she proceeded westward through a green light thinking that the vehicle had headed towards the Canada Games Centre. Cst. Jury then noticed the taillights of a vehicle to her right, proceeding northward on the Alaska Highway. She decided to make another U-turn with her police car and pursue this vehicle. Cst. Jury followed the vehicle northbound from the Alaska Highway intersection for approximately three kilometres and pulled it over near the entrance to the Raven's Ridge subdivision. Approximately three minutes had passed between the time she first turned on her emergency lights after passing the oncoming, speeding vehicle on Two Mile Hill, and stopping the suspect vehicle on the Alaska Highway.

Cst. Jury did not notice any speeding or erratic driving, or any problem with the way the vehicle pulled over and stopped.

[4] Cst. Jury did not recall if she made any other vehicle stops that evening on her night shift. Further, she testified that her sole purpose for stopping Mr. Rowat's vehicle was that "it was the only vehicle on the road at the time."

[5] Cst. Jury communicated her location to the RCMP dispatch operator, who indicated that the vehicle she had stopped was registered to Mr. Rowat. She got out of the police car, went over to the driver's side of the vehicle and asked for the registration and insurance. The accused handed her the registration and insurance documents, however they were both expired. The accused said he knew they were expired and he apologized several times for speeding. Cst. Jury took the documents, as well as the accused's driver's licence back to the police car and ran checks on Mr. Rowat. She noticed nothing unusual or remarkable about the accused during that exchange. In the police car, Cst. Jury wrote up summary offence tickets for speeding and for having no insurance or registration. She then returned to Mr. Rowat's vehicle to serve him with the three tickets.

[6] At that point, the accused rolled down the window to speak with Cst. Jury and she smelled alcohol on his breath and from the interior of the car. She asked him if he had any alcohol to drink that evening and the accused replied that he had consumed one beer. Cst. Jury decided to detain the accused for a roadside breath sample and took him back to the police car for that purpose. The accused complied with the demand for the sample and registered a fail. Cst. Jury then placed him under arrest for impaired driving and put him in the back of the police car.

[7] Next, Cst. Jury returned to the accused's vehicle and searched the centre console and under the seat, as well as the immediate area of the driver. She found seven small baggies and a small white round container containing a white powder she believed to be cocaine. Cst. Jury also found and seized cash and three cell phones in the front area of the vehicle. She then re-arrested Mr. Rowat for possession of cocaine for the purposes of trafficking and returned him to the police detachment to administer a breathalyzer test. There, he produced blood alcohol readings of 130 mgs/% and 110 mgs/%.

[8] Cst. Jury originally charged the accused with impaired driving, driving over 80 mgs/% and possession of cocaine for the purposes of trafficking. However, when the matter came to trial, the Crown did not proceed on the impaired count and only sought convictions for the over 80 mgs/% and for simple possession of cocaine, rather than possession for the purposes of trafficking.

[9] The trial began with a *Charter voir dire* on May 15, 2018. Defence counsel relied upon an earlier notice filed by previous counsel for the accused regarding certain *Charter* issues that would be raised. The Crown's only witness was Cst. Jury, who testified and was excused before the lunch break. When the *voir dire* resumed in the afternoon, defence counsel indicated that she was raising a new *Charter* issue regarding the arbitrariness of the traffic stop. Crown counsel expressed concerns because this was a new *Charter* issue which had not been previously identified by the defence. Accordingly, he had refrained from asking Cst. Jury certain questions about the traffic stop, because he did not think it was at issue. Crown counsel also applied to recall the officer to testify about what was on her mind when she stopped the accused's

vehicle. Defence counsel opposed that on the basis that the Crown had closed its case and that the officer should not be given a chance to "fix her evidence". The trial judge appeared to agree and denied the Crown's application to recall the officer.

[10] The parties then made submissions on the validity of the traffic stop and the vehicle search. The trial judge ruled that Cst. Jury's subjective purpose for stopping Mr. Rowat's vehicle was not enough to legitimize the stop, because there must also be "some objective reasonableness to the stop as well". Accordingly, he found that the traffic stop breached the accused's right to be free from arbitrary detention under s. 9 of the *Charter*. The trial judge then excluded the breath test results and the drugs. Consequently, the accused was acquitted on the remaining charges of driving over 80 mgs/% and possession of cocaine. The reasons for judgment are cited as 2018 YKTC 20.

ISSUES

[11] The issues on appeal are whether the trial judge erred by:

1) finding that the traffic stop breached s. 9 of the *Charter*;

2) allowing the accused to advance a new s. 9 *Charter* breach allegation without proper notice, and by denying the Crown's application to recall Cst. Jury; or

3) improperly applying the test to determine whether the evidence obtained following the breach should be excluded under ss. 24(2) of the *Charter*.

ANALYSIS

1) ***Did the trial judge err by finding that the traffic stop breached s. 9 of the Charter?***

[12] The standard of review on this question of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 ("*Housen*"), at para. 8.

[13] The discussion of this issue begins with s. 106 of the Yukon *Motor Vehicles Act*, R.S.Y. 2002, c. 153, ("Yukon *MVA*") which states:

> 106 Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately
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> (a) bring their vehicle to a stop;
>
> (b) furnish any information respecting the driver or the vehicle that the peace officer requires; and
>
> (c) remain stopped until they are permitted by the peace officer to leave. S.Y. 2002, c.153, s.106

[14] This section is similar to legislation in other provinces which has been interpreted by the Supreme Court of Canada as authorizing arbitrary detentions of motorists for purposes legitimately connected to highway safety concerns. The arbitrary detentions generally occur in the context of organized police check stops or random patrols by roving police vehicles. The Supreme Court has said repeatedly that the stops are justified under s. 1 of the *Charter* because they help to ameliorate the pressing and substantial problem of death and destruction on our highways. They also facilitate the detection of highway safety offences, which are otherwise nearly impossible to investigate without stopping the drivers concerned. Examples are: invalid registration documents; invalid insurance; the non-existence or suspension of a driver's licence; a vehicle which is mechanically unfit; and impaired drivers. The Supreme Court has also said that these arbitrary stops are justifiable because they help to deter drivers from committing these types of highway safety offences.

[15] However, the authority to make such arbitrary stops is not unlimited. Here, I agree with the submissions of Crown counsel, which were unopposed by the respondent accused. The two principal limitations are as follows.

[16] First, police cannot use the authority to arbitrarily detain under s. 106 of the Yukon *MVA* (and other related similar legislative provisions) in a discriminatory manner. For example, they cannot stop drivers based on their sex or race or any other discriminatory basis: *Brown v. Durham Regional Police Force,* [1998] 43 O.R. (3d) 223 (O.N.C.A.) ("*Brown*"), at para. 38.

[17] Second, police cannot use these powers to further a criminal investigation unrelated to traffic safety.

[18] One of the leading cases in this area is *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 ("*Ladouceur*"), which upheld the constitutionality of s. 189a(1) of the Ontario *Highway Traffic Act*, R.S.O. 1980, c. 198, ("*HTA*"), a provision very similar in effect to s. 106 of the Yukon *MVA*. Speaking for the majority, Cory J. spoke about the concern for potential abuse by law enforcement officials, at para. 60, and continued:

> … In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the Charter. (my emphasis)

[19] In *Brown*, the police purported to act under s. 216(1) of the Ontario *HTA*, another provision similar in effect to s. 106 of the Yukon *MVA*. They stopped motorcyclists

travelling to and from a small resort community, who were suspected of being members of criminal organizations regularly engaged in a wide variety of criminal activity. The trial judge found as a fact that one of the purposes behind the stops was also a legitimate concern for highway safety regulation, i.e. to check for such things as proper documentation, proper helmet use, mechanical fitness and sobriety. The Ontario Court of Appeal upheld this finding of fact and also agreed with the trial judge that the police had other purposes for the stops, i.e. the gathering of police intelligence to assist in the investigation of organized criminal activity and maintaining the public peace. However, the Court held that this did not render the stops unlawful, because the additional purposes for the stops were not improper (para. 49). In other words, the police can have a dual purpose for such arbitrary stops: (1) a legitimate concern for highway traffic safety under s. 216 of the Ontario *HTA*: and (2) another legitimate police purpose. The Court held that, if the additional purpose unrelated to highway traffic safety is improper, then that would take the detentions outside of the authority provided by s. 216, and similar legislation in other provinces (para. 35). Examples of such improper purposes would be officers stopping motorists for discriminatory reasons, or intending to conduct unauthorized searches, or stopping someone to vent their personal animosity towards that person (para. 39).

[20] The Court acknowledged that *Ladouceur* held that the equivalent predecessor section to s. 216 of the Ontario *HTA* authorized arbitrary detentions, in that it allowed random stops without any basis to believe that the person or vehicle stopped was in contravention of any law. Further, the majority in *Ladouceur* held that the section could

be justified under s. 1 of the *Charter* as a reasonable limit on the right to be free from arbitrary detention (para. 50).

[21] However, the Court of Appeal in *Brown* observed that the holding in *Ladouceur* did not mean that all stops made under s. 216 would be arbitrary and rendered constitutional only by the saving provision in s. 1 of the *Charter* (para. 51). That is because a stop made under s. 216 will not result in an arbitrary detention if the decision to stop is made pursuant to criteria relevant to highway safety concerns, which the Court referred to as "articulable cause", i.e. a reasonable suspicion that a driver is violating some law pertaining to highway regulation and safety (paras. 51 - 54). Where a stop is "selective" and based upon articulable cause, it is not arbitrary (para. 53). However, the Court further observed that *Ladouceur* makes it unnecessary to distinguish between arbitrary and non-arbitrary stops, because both are constitutional (para. 51).

[22] In the case at bar, the trial judge correctly recognized that the preventative practice of random stops to ensure motor vehicle safety and driver sobriety have been determined to be constitutionally valid (para .7). However, he concluded that Cst. Jury's stop "was not random" (para. 8). The trial judge accepted as a fact that Cst. Jury had a "subjective belief" that the driver of the suspect vehicle was the same person who had been speeding earlier on Two Mile Hill (para. 6). He concluded that Cst. Jury's grounds for this belief were "not objectively reasonable as there was nothing wrong with [Mr. Rowat's] driving at the time he was stopped and Cst. Jury was not claiming to be out conducting random safety checks" (para. 9).

[23] It appears, from reading the judgment as a whole, that the trial judge reasoned that, since the stop was selective and not purely arbitrary, then it had to have been based upon articulable cause, i.e. reasonable suspicion. Further, since Cst. Jury "could not articulate any basis" for connecting the speeding vehicle she earlier observed with Mr. Rowat's vehicle, other than it was the only vehicle she could find at the time, then there was "no rational basis" for the stop and her suspicion was not reasonable (paras. 6 and 9). Therefore, he concluded the stop was arbitrary and violated s. 9 of the *Charter* (para. 9).

[24] With respect, the flaw in this reasoning is the apparent premise that all selective stops under s. 106 of the Yukon *MVA*, or equivalent legislation elsewhere, must be based on reasonable suspicion. The trial judge purported to rely upon *R. v. Wilson*, [1990] 1 S.C.R. 1291 ("*Wilson*"), at para. 13, in support of his analysis, I do not agree that *Wilson* justifies the trial judge's conclusion.

[25] *Wilson* was decided by the Supreme Court at the same time as *Ladouceur*. It involved s. 119 of the Alberta *Highway Traffic Act*, which is almost identical to s. 106 of the Yukon *MVA*. There, the police stopped the accused, who was driving away from a hotel shortly after the closing time for the bar. The vehicle and its occupants were unknown to the police officer. There were three men in the front seat of the vehicle and the vehicle had out-of-province licence plates. The officer testified that he was looking for impaired drivers, although he did not stop the vehicle pursuant to an organized check stop program. The accused argued that even if the police officer's actions were authorized by statute, they violated s. 9 of the *Charter* and could not be justified under s. 1. In response, Cory J., again for the majority, simply said this:

> 12 … the appellant's arguments that the stopping was unconstitutional can be dismissed on two bases. First, **if** the stopping of the appellant's vehicle is considered to be a random stop then for the reasons given in Ladouceur, supra, I would conclude that although the stop constituted an arbitrary detention, it was justified under s. 1 of the Charter.
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> 13 Second, in this case the stopping of the appellant was not random, but was based on the fact that the appellant was driving away from a hotel shortly after the closing time for the bar and that the vehicle and its occupants were unknown to the police officer. While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community. In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the Charter. (my emphasis)

[26] These passages do not support the proposition that all selective stops must be based upon reasonable suspicion. Rather, what I think the Supreme Court is saying here is that if there is a reasonable suspicion, then the stop is not arbitrary. However, even if a stop is selective, if it is not based upon a reasonable suspicion, then by default it must be considered to be random and arbitrary. We know from *Ladouceur* that random and arbitrary stops under legislation like s. 106 of the Yukon *MVA* are justifiable under s. 1 of the *Charter*.

[27] Putting it another way, if purely random and arbitrary stops are justifiable under this type of legislation, where the police have no grounds whatsoever to stop a motorist, providing they do so for purposes of regulating and enforcing highway safety, then why should an officer who has a “suspicion” that a motorist is committing a particular highway safety offence, such as speeding, be required to have reasonable grounds for

that suspicion? The answer must surely and logically be that there is no requirement for such reasonable grounds.

[28] In *Brown*, which was clearly a case of selective stops, Doherty J., speaking for the Ontario Court of Appeal, put it this way:

> 54 When articulable cause is used in reference to a stop under s. 216(1), it may refer to a stop flowing from a reasonable suspicion that a driver is violating some law pertaining to highway regulation and safety. It may also refer to more generalized safety concerns as in the case of the officer who stops trucks because experience teaches that trucks are more likely to be unsafe. Since the lawfulness of the stop does not depend on the existence of articulable cause, it is unnecessary to connect that cause to a specific person, offence or investigation as long as that cause is legitimately connected to legitimate highway safety concerns.
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> …
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> 56 Reduced to its starkest terms, the appellants' action amounts to a claim that they were stopped without reasonable cause. That claim must fail, first, because the stop was authorized by s. 216(1) of the *HTA* and cause is not required under that section and, second, because on the facts as found by the trial judge, the police had sufficient cause to stop the appellants. (my emphasis)

[29] *Brown* has since been referred to with approval by the Supreme Court in *R. v. Nolet*, 2010 SCC 24, at para. 38.

[30] Putting it still another way, there was no basis for the trial judge to import the standard of reasonableness into the stop in this case, regardless of the fact that it was selective and based upon a suspicion that Mr. Rowat had committed a speeding offence. Clearly, in my view, this was a case where the purpose of the police officer in making the stop was the enforcement and regulation of highway safety under s. 106 of the Yukon *MVA*.

[31] Accordingly, I conclude that the trial judge erred by finding that the traffic stop breached s. 9 of the *Charter*.

2) ***Did the trial judge err by allowing the accused to advance a new s. 9 Charter breach allegation without proper notice, and by denying the Crown's application to recall Cst. Jury?***

[32] It should first be said on this issue that, at the appeal hearing, the Crown appellant effectively resiled from its position in its factum that the first error committed by the trial judge was to allow the accused respondent to advance a new s. 9 *Charter* argument without proper notice. That was a fair position to take, given that the evidence regarding the reasons for Cst. Jury's traffic stop was apparently unanticipated by both counsel.

[33] We have a Practice Direction (Criminal-4) in this Court requiring accused persons to give advance notice of applications to exclude evidence under s. 24(2) of the *Charter*, where the grounds for the application are known in advance of trial. The rationale for such advance notice is trial efficiency and fairness to the Crown: *R. v. Dwernychuk*, 1992 ABCA 316; and *R. v. Hozack*, 2010 YKTC 59. However, the practice direction does not set a hard and fast rule. It specifically states that nothing in it shall be interpreted as derogating from the right of an accused to make such an application at any point in the trial. Further, it states:

> In applications to exclude evidence under s. 24(2) of the *Charter*, where the grounds are not known before trial, or the full basis for the application is not established until evidence emerges at trial, the trial judge will manage the application process.

[34] Therefore, the remaining question to be decided under this issue is whether the trial judge erred in denying the Crown's application to recall Cst. Jury. That was a

discretionary decision and therefore the standard of review is that the decision is entitled to deference and should not be disturbed absent an error in principle.

[35] In *R. v. Blom*, [2002] 16 O.R. 3d 51 ("*Blom*"), the Ontario Court of Appeal was dealing with an appellant accused who was charged with impaired driving and driving "over 80". He had given notice of a *Charter* application to challenge the admissibility of a statement he made at the scene of the accident. A *voir dire* was held to determine the admissibility of the appellant's statement. After a civilian and a police officer had testified on the *voir dire*, the Crown objected to the sufficiency of the *Charter* notice. The trial judge ruled that the notice was deficient and that the appellant was therefore precluded from advancing his *Charter* argument. The Court of Appeal overturned that decision. In doing so it made the following comments which are germane to the case at bar:

> 23 Where a party complains of inadequate notice, it is crucial for the trial judge to consider the issue of prejudice: does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented? If there is no real prejudice, inadequate and notice should not prevent consideration of the *Charter* application. If the inadequate notice does put the opposing party at a disadvantage, the court must consider whether something less drastic than refusing to consider the *Charter* argument, but still consistent with the goal of achieving "fairness in administration and the elimination of unjustifiable expense and delay", can be done to alleviate that prejudice. If so, that course should be followed in preference to an order refusing to entertain the *Charter* application. (my emphasis)

[36] In allowing the appeal, the Court of Appeal determined that the appellant's defective notice caused little or no prejudice to the Crown. In particular, the Court noted that it was a routine prosecution for a routine offence and the appellant's *Charter*

argument was neither factually complex nor legally novel. However, more importantly for the case at bar, the Court observed, at para. 27:

> … There is no suggestion that the Crown would have called additional evidence on the *Charter* point. Nor is there any suggestion that Crown counsel would have conducted the examination of witnesses any differently had the notice been more complete. …

[37] In the present case, it is almost certain the Crown would have called additional evidence on this *Charter* point if it had known that the defence was going to argue that the traffic stop was an arbitrary detention. However, because the issue was not raised by defence counsel until Cst. Jury had finished testifying and had been released as a witness, Crown counsel had no notice that it would be argued until after the constable had finished her evidence. Further, when he applied to recall Cst. Jury, it quickly became apparent that the trial judge was concerned about the lack of objective reasonable grounds for the traffic stop. At that point, Crown counsel made it very clear that he wanted to ask the Constable further questions about what was in her mind when she pulled Mr. Rowat's vehicle over. The defence then objected, stating that allowing the application would simply be giving an opportunity to the constable to "fix her evidence" which would be prejudicial to the accused, and the trial judge seemed to agree.[1] In ruling against the Crown on the recall of Cst. Jury, the trial judge said this:

> With respect to, then, the request to recall the officer, I've been thinking about it, and really to my mind, it's the responsibility of the Crown to demonstrate the lawfulness of the officer's actions throughout all phases of the investigation and at all junctures. And this has got to be really a fundamental starting point, the lawfulness of the accused's stopping in the first place.
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> …

[1] Transcript, May 15, 2018, p. 41.

> So I don't think in all of the circumstances it would be appropriate to permit the recalling of the officer to establish her subjective belief. I don't - I think that the threshold is one that's actually higher than that, requiring some objective reality. So the request to recall the officer is declined.[2]

[38] What this indicates to me is that if the arbitrary detention issue in relation to the traffic stop had been flagged as an issue by the defence before Cst. Jury finished testifying, it is almost certain that Crown counsel would have asked her questions about the reasons for her stop. While speeding was clearly one of the reasons, the evidence suggests that it was not the only one. For example, she testified that after pulling over Mr. Rowat, she performed a number of computer checks before even approaching his vehicle. First, she did a registration check on the licence plate (a "10-28"). Presumably, that would have been to confirm the name of the owner of the vehicle and whether the vehicle matched the description in the government's motor vehicle database. Second, she did a check on the driver's licence (a "10-27"). Third, she did a check on the Canadian Police Information Computer ("CPIC") system (a "10-29") to determine whether the vehicle had been stolen and whether it had been flagged for previous impaired drivers. Then, after approaching Mr. Rowat in his vehicle, she also required him to produce his registration and insurance documents.

[39] It is understandable that, in order to charge him for the speeding infraction, the officer would have required Mr. Rowat, at a minimum, to produce his driver's licence. However, technically, there was no need for her to perform these other checks or to produce proof of valid registration and insurance in order to charge him with speeding. This suggests to me that Cst. Jury very likely had other highway safety reasons in mind

[2] Transcript, May 15, 2018, p. 44.

when she made the stop, beyond simply that of the speeding infraction. If she did, then it also seems likely that the stop would have been justified under s. 106 of the Yukon *MVA*, regardless of whether she had objective reasonable grounds.

[40] This was a *Charter* application by the defence. Therefore, the defence had at least the initial burden of making a *prima facie* case that this was an arbitrary detention. Thus, I agree with Crown counsel that he was therefore entitled to know the case he had to meet in responding to that application. As the application was not raised until after Cst. Jury was released as a witness, Crown counsel had no reason to pursue additional questions relating to the reasons for the stop, because those reasons were not at issue.

[41] It is in this sense that I agree that the Crown was prejudiced by the late *Charter* application, and specifically by being refused the opportunity to recall Cst. Jury. Returning to the language in *Blom*, if the inadequate notice puts the opposing party at a disadvantage, then the court must consider whether something less drastic than refusing to consider the *Charter* issue can be done to alleviate that prejudice, consistent with the goal of achieving fairness. In my view, the thing which would have alleviated the prejudice in this case would have been to recall Cst. Jury. Further, it is no answer to say that the recall would have been unfair to the accused because it would have given the constable an opportunity to “fix her evidence”. That is because, if proper *Charter* notice had been given in the first place, Crown counsel would almost certainly have asked the desired questions surrounding the constable’s reasons for the stop.

[42] My conclusion in this regard is supported by the following passage in *R. v. P.* (M.B.), [1994] 1 S.C.R. 555, although that was a decision about the Crown reopening its case during a trial, where it had the onus throughout:

> 20 The keystone principle in determining whether the Crown should be allowed to reopen its case has always been whether the accused will suffer prejudice in the legal sense -- that is, will be prejudiced in his or her defence. A trial judge's exercise of discretion to permit the Crown's case to be reopened must be exercised judicially and should be based on ensuring that the interests of justice are served.

[43] For these reasons, I conclude that the trial judge's refusal to allow Cst. Jury to be recalled was an error in principle.

3) ***Did the trial judge err by improperly applying the test to determine whether the evidence obtained following the breach should be excluded under subsection 24(2) of the Charter?***

[44] I will deal with this issue discretely, on the assumption that I was wrong to decide above that the trial judge erred by finding that the traffic stop breached s. 9 of the *Charter*.

[45] A decision whether to exclude evidence under ss. 24(2) of the *Charter* is a discretionary one and the standard of review is to give such decision "considerable deference": *R. v. Grant*, 2009 SCC 32 ("*Grant*"), at para. 86.

[46] Subsection 24(2) of the *Charter* states:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[47] The Supreme Court in *Grant* determined that a consideration of "all the circumstances" engages three avenues of inquiry:

1) the seriousness of the *Charter*-infringing state conduct (admission of the evidence may send a message that the justice system condones serious state misconduct);

2) the impact of the breach on the *Charter*-protected interests of the accused (admission of the evidence may send a message that individual rights count for little); and

3) society's interest in the adjudication of the case on its merits.

[48] The trial judge's reasons in this regard are found in the last paragraph of his judgment:

> 10 While it cannot be clearly found that the officer was operating in bad faith, the stop was not made with objectively reasonable grounds. Ultimately, the impact upon the accused, while not egregious, was not trivial. There is a societal interest in keeping the streets safe and investigating *Motor Vehicles Act* breaches but these investigations must be for rational and clearly articulated purposes. Here, the officer's stated purpose and subsequent stopping of Mr. Rowat did not comport with the requirement that it be objectively reasonable. The appropriate remedy is the exclusion of the evidence flowing from the arbitrary stop.

[49] I am mindful here of the difficult task confronting busy trial judges in this territory, as well as the discretionary latitude that should be accorded to them, as they are often required to balance competing factors and make difficult choices on the spot. Accordingly, I do not criticize the trial judge's reasons here for their brevity, but rather because they do not permit meaningful appellate review of the correctness of his

decision: *R. v. Sheppard*, 2002 SCC 26, at para. 28. It is in this sense that I say, respectfully, the trial judge erred.

[50] In the first line of the above paragraph, the trial judge is presumably addressing the first line of inquiry under *Grant*, i.e. the seriousness of the breach. However, he makes no comment at all about how serious the breach was, other than to say "the stop was not made with objectively reasonable grounds". That is simply a restatement of the ratio for finding that there was a breach. It does not indicate, even implicitly, how serious the breach was.

[51] It must also be borne in mind here that police officers in this territory, and indeed across Canada, clearly have the authority to stop motorists at random for highway traffic and safety purposes. Even if I was wrong above in concluding that objectively reasonable grounds were not required for this particular stop, if the evidence had come out differently, justifying a purely random and therefore arbitrary stop, there would have been no breach at all, because legislation like s. 106 of the Yukon *MVA* has been found to be justifiable under s. 1 of the *Charter*.

[52] As for the second line of inquiry under *Grant*, i.e. the impact of the breach upon the accused, the trial judge simply says that it was "not egregious" but "not trivial". He gives no reason for why he comes to that conclusion.

[53] In addressing the third line of inquiry under *Grant*, i.e. the societal interest in an adjudication on the merits, the trial judge recognized at paragraph 10, that "[t]here is a societal interest in keeping the streets safe and investigating *Motor Vehicle Act* breaches", but then goes on to say that those investigations "must be for rational and clearly articulated purposes". That, with respect, it is an incorrect statement of the law.

Yukon *MVA* investigations can clearly be conducted randomly and arbitrarily, providing they are genuinely done for highway safety purposes. The trial judge then went on to say that the stopping of Mr. Rowat did not comport with the requirement that it be objectively reasonable. Once again, even assuming for the purposes of dealing with this issue that that is a correct conclusion, it does not address the societal interest, but rather only restates the reason for the breach.

CONCLUSION

[54] For the above reasons, I reverse the acquittal and remit the matter back to the Territorial Court for trial, pursuant to s. 834(1) of the *Criminal Code*.

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GOWER J.
(Written by Gower J. before his passing on October 29, 2018)